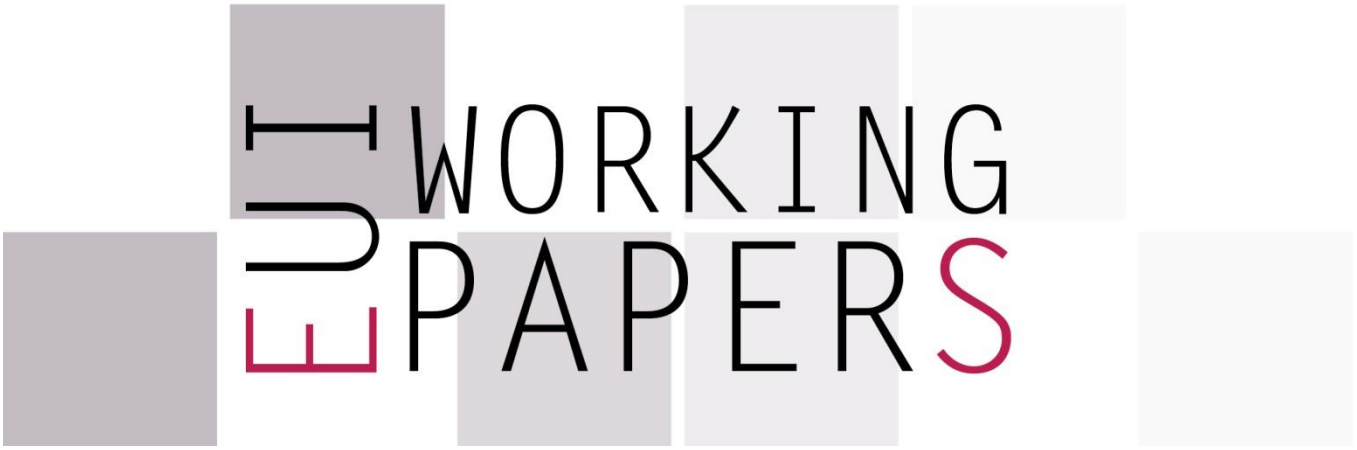

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How EU law shapes opportunities for preliminary references on fundamental rights: discrimination, data protection and asylum

Edited by Elise Muir, Claire Kilpatrick, Jeffrey Miller and Bruno de Witte

European University Institute
Department of Law

HOW EU LAW SHAPES OPPORTUNITIES FOR PRELIMINARY REFERENCES ON FUNDAMENTAL RIGHTS: DISCRIMINATION, DATA PROTECTION AND ASYLUM

Edited by Elise Muir, Claire Kilpatrick, Jeffrey Miller
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Abstract

This publication explores the impact of procedural provisions inserted in EU fundamental rights legislation (in particular non-discrimination law) that are aimed at facilitating access to court in support or on behalf of victims. The papers investigate the interplay between: 1. 'collective actors' understood in the broad sense to cover civil society organisations and independent organisations such as equality bodies intended to represent individuals; 2. the actual litigation on EU fundamental rights law before domestic courts as it unfolds before the CJEU by way of preliminary references; and 3. the rules on access to domestic courts (shaped, to some extent, by EU legislation) as providing legal opportunity structures for preliminary references to the CJEU.

Keywords

collective actors (Fundamental Rights and equality bodies, NGOs, unions); EU legislative access to justice requirements; EU Fundamental Rights and discrimination litigation; preliminary references

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Advancing EU equality law in Italy: Between unsystematic implementation and decentralized enforcement

Virginia Passalacqua[*]

The EU Equality Directives represented a key turning point in the field of anti-discrimination law in Italy. However, the Italian law-maker failed to implement the Directives systematically, and this generated confusion about their interpretation and application. This also affected the participation of collective actors. With the aim of understanding whether EU equality law has facilitated collective actors' access to courts, the paper examines the role that they have played in the anti-discrimination cases brought before the Court of Justice of the EU. In Italy, collective actors participated in a limited number of preliminary references, mostly in the field of discrimination on the grounds of nationality. The work of collective actors, both inside and outside the courtroom, has been crucial in creating a decentralized form of enforcement of EU equality law. Through litigation and campaigns, collective actors contributed to the full implementation of EU anti-discrimination law, filling the gaps left by the Italian law-maker. The paper concludes that, on the one hand, EU law introduced important tools to enhance protections against discrimination in Italy; but, on the other, the unsystematic transposition of EU law created some obstacles to the protection of migrants from discrimination and to collective actors' access to courts.

Introduction

This paper develops two main questions relating to Italian anti-discrimination law and practice. The first is how EU equality law affected the Italian legal framework. The second looks at whether the introduction of EU anti-discrimination law has facilitated collective actors' access to courts, with a focus on the Court of Justice of the EU (hereinafter, CJEU).[1] To answer the first question, I analyse the Italian legal framework before and after the adoption of the Equality Directives. The second question, instead, requires a more contextual analysis. First, I look at how the implementation of EU anti-discrimination law changed the rules about collective actors' *locus standi*. Then, I identify the proceedings before the CJEU where collective actors have participated. As part of the research conducted for this paper, I interviewed the participants in the proceedings and consulted Italian press articles, NGOs' documents and other non-legal sources that provide insights into the context of the litigation. Finally, the paper assesses whether EU law had a positive impact on Italian judicial remedies against discrimination.

Preliminary Remarks on Italian Anti-Discrimination Law

Italian anti-discrimination law evolved in three stages. The first stage created its constitutional foundation; the second was brought about by labour law reforms; the third was triggered by the introduction of the EU Equality Directives. These three stages are summarized in the first sub-section below, while the other sub-section focuses on the provisions relating to the creation of the Italian Equality Body and on collective actors' participation in anti-discrimination proceedings.

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[1] This paper was first presented at the workshop 'How EU law shapes opportunities for preliminary references on fundamental rights: discrimination and other examples', held at the EUI on 24 February 2017 and organized by Professors Elise Muir, Claire Kilpatrick and Bruno de Witte. I would like to express them my gratitude for the opportunity to participate in this interesting project and for their valuable feedback on my work.

The Three Stages of Italian Anti-Discrimination Law

The first stage of the evolution of Italian anti-discrimination law dates back to the drafting of the Constitution in 1947. Article 3 enshrines the cornerstone of Italian anti-discrimination law: the principle of equality. Its first part states that all are equal before the law (principle of formal equality); and the second part commits the Italian law-maker to removing the economic and social obstacles that constrain the realization of equality among citizens (principle of substantive equality). An ideal of social equality lies behind the second part of the article, which requires the law-maker to do his utmost to grant equal opportunities to all and, therefore, constitutes the basis for positive actions against discrimination. In the Italian Constitution we also find the first explicit reference to a ground of prohibited discrimination: sex. Article 37 states that women are entitled to enjoy the same pay and rights as men in the workplace. But the second part of the article requires special protection and adequate working conditions for women to ensure the fulfilment of their 'essential role in the family'. The Constitution, in sum, states that women are equal but different from men. This mirrors the common perception about gender roles in post-fascist Italy.[2] At that time, men and women were considered psycho-physically different, and accordingly charged with different responsibilities both in the work sphere and in the family sphere.[3]

The second stage saw the constitutional principles enacted by the Italian law-maker. The first major anti-discrimination legal tools were adopted in the field of labour law. However, this did not happen overnight; only in the seventies, prompted by a period of workers' strikes and demonstrations, did Italy undertake a process of labour reforms. This period of political struggles culminated in the introduction of the Workers' Statute, which, besides generally strengthening workers' rights, in article 15 provided special protection against discrimination on the grounds of political belief and trade union affiliation.[4] A few years later, in 1977, a law on equality of treatment between men and women in the workplace was adopted, extending the protection of article 15 to discrimination on the grounds of sex.[5] The introduction of this second law was to a great extent due to Community law: indeed, two directives on the prohibition of sex discrimination in employment had been adopted shortly before.[6]

EU law vastly marked the third stage in the evolution of Italian equality law. Under the impulse of the EU Equality Directives of 2000, Italian equality law was revolutionised, leading experts to call this 'the golden age' of anti-discrimination law in Italy.[7] In 2003, the Italian government adopted two decrees, one implementing the Race Equality Directive[8] and the other the Framework Directive.[9] However, Favilli rightly noted how such transpositions were made in an almost literal way, with no attempt at coordination with the pre-existing Italian legal instruments of anti-discrimination.[10] This unsystematic

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[2] Barbera explains that, even if the constitutional norm might seem contradictory, it correctly mirrored social perceptions at the time and maintained social cohesion. Marzia Barbera, "Parità Di Trattamento Tra Uomini E Donne in Materia Di Lavoro," *Enciclopedia Giuridica Treccani* VII (2010).

[3] Maria Vittoria Ballestrero, "Il Lavoro Delle Donne Secondo Barassi," *Lavoro E Diritto*, no. 1/2002 (2002).

[4] Art. 15 of Law 300/1970, *Statuto dei Lavoratori*.

[5] Law 903 of 1977, '*Parità di trattamento tra uomini e donne in materia di lavoro'*. For the sake of precision, however, it should be noted that the first norm adopted in the field of discrimination on the grounds of sex was Law 7 of 1963, which prohibits the dismissal of a female worker because of marriage.

[6] Directive 75/117/EEC and Directive 76/207/EEC; Flavia Cannata, *L'eguaglianza nella previdenza di genere* (Milano, Italy: Franco Angeli, 2014), 61.

[7] Fausta Guarriello, "Il nuovo diritto antidiscriminatorio," *Giornale di Diritto del Lavoro e Delle Relazioni Industriali*, 2003, 341.

[8] Legislative Decree 215/2003 implementing the Directive 2000/43/EC prohibiting discrimination on the grounds of race and ethnic origins.

[9] Legislative Decree 216/2003 implementing the Directive 2000/78/EC prohibiting discrimination on the grounds of sexual orientation, disability, age, religion and belief in the workplace.

[10] Chiara Favilli, "Italy, Country Report Non-Discrimination, State of Affairs 01 January 2016," *European Equality Law Network*, October 4, 2016, 7.

transposition, as I shall show, generated problems of interpretation. New legislation was also adopted in 2006,[11] whereby the prohibition on disability discrimination was extended beyond the field of employment, and in 2010,[12] which transposed the 'Gender Recast' Directive 2006/54, bringing together the main instruments for equality between men and women.

At present, all the main Italian anti-discrimination provisions are the result of the transposition of European directives. This is also true for the equality clauses provided by the directives in the field of migration and EU citizenship. These clauses establish that, in some situations, migrants and citizens should be treated equally.[13] The only partial, but important, exception is the Italian Immigration Law adopted in 1998.

The Immigration Law, which preceded the Equality Directives, already contained a prohibition on direct and indirect discrimination on the grounds of nationality, race, religion and ethnic origin (article 43 and 44).[14] Discrimination on these grounds can be challenged by victims via a special judicial remedy: the 'civil action against discrimination', which is widely used in practice.[15] This action can be also brought directly by trade unions in case of 'collective discrimination' in the workplace, which is discrimination against a group of people that are not directly or immediately identifiable.[16] However, only the trade unions that are 'the most representative at the national level' have legal standing, and only against acts of the employer in the workplace. As next section will show, collective actors' access to courts was substantially increased in 2003 by the law transposing the Equality Directives.

Notwithstanding the evident overlap between the scope of the Immigration law and the Race Equality Directive, articles 43 and 44 were not repealed by the Italian legislature.[17] And luckily so, for they also prohibit discrimination on the grounds of nationality, which is explicitly excluded from the scope of the Race Equality Directive.[18] The directive, in fact, despite applying also to third-country nationals, does not protect them from differential treatments based on their nationality.[19] Even if, at first sight, the difference between the grounds of nationality and race/ethnic origin might seem a formal one, it has practical repercussions for Italian equality litigation, as this paper will show.

Judicial Remedies Against Discrimination and the Role of Collective Actors

Regarding judicial remedies against discrimination, in 2011 the Italian law-maker reformed the anti-discrimination proceedings by including a special fast-track procedure.[20] Even if this was an important step towards the systematization of the field, access to courts is still regulated by each specific anti-

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[11] Law 67/2006, "*Misure per la tutela giudiziaria delle persone con disabilità vittime di discriminazioni*".

[12] Legislative Decree 5/2010: "*Attuazione della direttiva 2006/54/CE relativa al principio delle pari opportunità e della parità di trattamento fra uomini e donne in materia di occupazione e impiego*".

[13] The strongest equality norm regards Union citizens who, under article 18 of the TFEU and article 24 of the Citizenship Directive 2004/38, are entitled to equal treatment with national citizens. Equal treatment clauses are also provided by the Long-Term Resident Directive and the Single Permit Directive, with a more limited scope of application. The last norm adopted in the field is Directive 2014/54 'on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers', of 16 April 2014. Although the deadline for transposition has already passed, it has not been transposed into the Italian legal framework.

[14] Legislative Decree n. 286 of 25 July 1998, "*Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*".

[15] *Azione civile contro la discriminazione'*: introduced by article 44 of the Immigration Law 286/1998.

[16] Article 44(10) of the Immigration Law 286/1998.

[17] Article 2(2) of the Legislative Decree 215/2003 makes them explicitly safe.

[18] Preamble 13 and article 3(2) of the Race Equality Directive.

[19] Discrimination on the grounds of nationality is instead prohibited with regard to Union Citizens, see article 18 TFEU.

[20] Article 28, Legislative Decree 150/2011.

discrimination instrument. This also means that each anti-discrimination law has its own *locus standi* rules for participation by collective actors.[21] This fragmentation creates uncertainty, leading experts to call for a systematization of the field.

Under the EU Equality Directives, Member States shall ensure that collective actors may participate in anti-discrimination proceedings on behalf of, or in support of, victims. This is one of the strategies that the EU law maker uses to secure an effective implementation of its policies, a phenomenon that scholars called 'proceduralization' of EU equality law.[22] However, when transposing the directives, the Italian law-maker decided to go beyond what EU law requires and introduced a remedy against collective discrimination. This remedy enables qualified collective actors to challenge in court a discriminatory act by themselves when a victim is not immediately and directly identifiable.[23] This might happen, for example, in the case of a public statement against LGBT people: the victim is not a single individual but an indeterminate group of people discriminated against for their sexual orientation.

Under the law transposing the Race Equality Directive, in order for collective actors to have *locus standi*, they need to be registered on an official list managed by the Italian government's Department for Equal Opportunities.[24] Subject to the same registration, they are entitled to bring actions against collective discrimination.[25] Moreover, since these provisions on collective actors' standing are regulated by the Italian transposition of the Race Equality Directive, formally they only apply to cases of discrimination on the grounds of race or ethnic origin; discrimination on the grounds of nationality is excluded.[26] This means that, for instance, if a registered association wants to challenge collective discrimination enacted by a school against non-Italian children, the association cannot use the transposition of the Race Equality Directive (because it does not cover nationality) or the Immigration Law, because it applies only to collective discrimination in the workplace. This gap in protection had serious consequences: in cases of collective discrimination based on nationality (like the case of *Nabil* discussed later) collective actors' *locus standi* has been contested. Still, in most cases, Italian judges have adopted a functional interpretation of the law, stating that collective discrimination may be challenged by collective actors on the grounds of nationality.

Another step towards the 'proceduralization' of EU equality law involved the creation of 'Bodies for the promotion of equal treatment', provided by the Race Equality Directive.[27] In Italy, this body is UNAR.[28] UNAR started operating in 2004, with a focus on discrimination based on race and ethnic origin. Over time, even though its mandate has never been officially expanded, UNAR has extended the

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[21] For discrimination in the workplace, see article 5, Legislative Decree 216/2003. For discriminations on the grounds of race and ethnic origins, see article 5 Legislative Decree 215/2003. For discriminations on the grounds of sex, see article 37, 198/2006. For discrimination on the grounds of disability, see article 4 of the Law 67/2006.

[22] Elise Muir, "Procedural Rules in the Service of the 'Transformative Function' of EU Equality Law: Bringing the Prohibition of Nationality Discrimination Along," *Review of European Administrative Law* 8, no. 1 (June 25, 2015): 153–76.

[23] Article 5(2) Legislative Decree 216/2003 transposing the Framework Directive; article 37 and 55 of the Legislative Decree 198/2006 on equality between men and women; article 4(3) of Law 67/2006 on disability rights. Each Italian anti-discrimination law establishes which collective actors are entitled to bring action against collective discrimination and whether they must fulfil some requirement. For instance, the transposition of the Framework Directive states that trade unions and associations representing the affected interest can challenge collective discrimination.

[24] The list is managed by the Department for Equal Opportunities of the Presidency of Council of Ministers, as provided by article 5 of Legislative Decree 215/2003.

[25] Article 5(3) of Legislative Decree 215/2003.

[26] Italian Immigration Law also provides for a remedy against 'collective discrimination' on the grounds of nationality, but this applies only to discrimination in the workplace and can only be pursued by the trade unions that are 'the most representative at the national level'. See art. 44(10) of the Immigration Law.

[27] Article 13 of the Race Equality Directive.

[28] UNAR stands for *Ufficio Nazionale Antidiscriminazioni Razziali*, and was instituted by the Legislative Decree 215/2003, article 7.

grounds of discrimination it deals with to include sex, disability, nationality, and sexual orientation. By law, the body can intervene in court, but in fact it mainly performs monitoring activities and manages a contact centre for victims of discrimination.[29] The Council of Europe criticized UNAR because it does not 'comply with the principle of independence and its powers are incomplete'.[30] The criticism seems to be well-founded, since the body is under the Department of Equal Opportunities of the Italian government and its director is appointed by the Italian Prime Minister. This exposes UNAR to political pressures, as denounced by European and international organizations and confirmed by the political scandals that have dogged the organization over recent years.[31]

According to official reports, in Italy, when it comes to judicial remedies against discrimination, most litigation has focused on discrimination on the grounds of nationality or race/ethnic origin.[32] This is probably due to a combination of cultural and social factors. Part of the explanation lies in the fact that there are many associations working in support of immigrants' and ethnic minorities' rights, while this is not the case for other fields. This also means that, in Italy, most discrimination cases where collective actors are involved concern migration and race/ethnic origin. Accordingly, the cases selected for the analysis below are all in this field.

Anti-discrimination Litigation in Italy: Analysis of the Most Relevant Cases in the Light of Collective Actors' Participation

This second section considers the role that collective actors play in anti-discrimination proceedings; special attention is given to the cases brought before the CJEU. I singled out the preliminary rulings where it was possible to detect collective actors' participation. Four cases feature the presence of collective actors, but only two of them deal precisely with anti-discrimination issues: *Kamberaj* and *Martinez Silva*.[33] I decided to also include in my analysis a third case, *Nabil*, even though it did not lead to a preliminary reference; the case of *Nabil* is relevant because it shows how EU equality law proved problematic for collective actors, since it does not provide them with *locus standi* to challenge collective discrimination on the grounds of nationality.

All three cases (*Kamberaj*, *Martinez Silva* and *Nabil*) happen to be in the field of anti-discrimination on the grounds of race/ethnic origins and nationality. This reflects the general trend of anti-discrimination litigation in Italy, since these types of discrimination are the most frequently alleged.[34] Still, each of the cases offers a different perspective on EU equality law. Indeed, the first concerns a case of discrimination against a long-term resident migrant; the second, discrimination against a third-country worker; and the third, collective discrimination. Analysed together, these three cases offer a multifaceted view on the impact that EU law has had on Italian anti-discrimination law.

Equal Treatment and Housing Benefit: Kamberaj v. IPES

The first case analysed is Kamberaj. Four collective actors supported the applicant's complaint against a norm that was allegedly discriminatory towards third-country nationals. The Kamberaj case gave rise

[29] UNAR, *Relazione Annuale 2014*, available at: http://www.unar.it/unar/portal/?p=1178 (last access on 4 August 2017)

[30] Council of Europe, *ECRI Report on Italy* 2015, CRI(2016)19, published on 18 March 2016, at page 15.

[31] European Equality Law Network, *News Report*, 05 October 2015; *ibidem*, *News Report*, 8 March 2017; both available at http://www.equalitylaw.eu/country/italy (last access on 4 August 2017).

[32] Favilli, "Italy, Country Report Non-Discrimination, State of Affairs 01 January 2016"; UNAR, *Relazione Annuale 2014*.

[33] The two that I excluded are joined Cases C-22/13, C- 61/13 to C-63/13 and C-418/13, *Mascolo v. MIUR*, EU:C:2014:2401; and Case C-89/13, *D'Aniello and others v. Poste Italiane SpA,* ECLI:EU:C:2014:299. Both deal with the legitimacy of stipulating a fixed-term work contract.

[34] See footnote 30.

to a preliminary reference that was decided by the CJEU in April 2012. First, I will briefly outline the proceedings; then, I will explain the collective actors' strategy and I will assess its impact.

Kamberaj: the proceedings

In the case of Kamberaj, the CJEU, upon request from the Labour Law Tribunal of Bolzano, interpreted two directives.[35] One was the Race Equality Directive; the other was the Long-Term Resident Directive, which provides for equal treatment between long-term resident migrants and Member State nationals.[36]

The proceedings were initiated by Mr Servet Kamberaj, an Albanian national residing in Italy since 1994. Four local associations intervened: Associazione Porte Aperte/Offene Türen, Human Rights International, Associazione Volontarius, and Fondazione Alexander Langer. Mr Kamberaj brought a 'civil action against discrimination' (article 44 of the Italian Immigration Law) to challenge the decision whereby IPES (the social housing institute) rejected his application for a housing benefit. IPES rejected Mr Kamberaj's application because the budget for third-country nationals' housing benefits for 2009 was exhausted. In Bolzano, the funds for housing benefits are allocated according to a 'linguistic' criterion:[37] every year the province decides on the amount of money to allocate to each of the three linguistic groups (Italian, German and Ladin speaking)[38] and to the third-country national migrants' group. However, in 2008, the province adopted a different method to calculate the funds for third-country nationals.[39] This resulted in a disadvantage for the latter group, which saw a rise in the number of rejections of applications for benefits. This comparatively more disadvantaged treatment was challenged for violating EU equality law. The Bolzano judge, acting upon the request of Mr Kamberaj's lawyer and the four associations, decided to stay the proceedings and refer the case to the CJEU.

In its decision, the Court of Justice first clarified that the Race Equality Directive did not apply in this case. In fact, Mr Kamberaj was treated differently because of his status as a third-country national, while the Directive applies only to discrimination based on race or ethnic origin.[40] The Court stated that the Directive 'does not cover difference of treatment based on nationality' and it applies without prejudice 'to any treatment which arises from the legal status of third-country nationals'.[41] However, the Court also noted that Mr Kamberaj enjoyed a right to equal treatment stemming from his status as a long-term resident; in fact, article 11 of the Long-Term Resident Directive granted him the right to be treated equally vis-a-vis Italian nationals with regard to social assistance. For this reason, the Court declared the province's policy incompatible with EU law.

The role of the four associations

Reports, local press articles and interviews with members of the intervening associations (Associazione Porte Aperte/Offene Türen, Human Rights International, Associazione Volontarius, Fondazione Alexander Langer) enabled me to understand their litigation strategy and their role in the Kamberaj case.

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[35] Case C-571/10, *Servet Kamberaj v. Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others* [2012].

[36] See art. 11(1) of Directive 2003/109.

[37] Article 5(7) of the Law of the Province n. 13/1998. The Province of Bolzano is characterized by the institutionalization and protection of the three linguistic groups that are historically present in the region. See Pallaoro and Coletti, '*Nuove' minoranze in Alto Adige/Südtirol: impatto sugli strumenti a tutela delle 'vecchie' minoranze*, in Medda-Windischer and Carlà (edited by) *Politiche Migratorie e Autonomie Territoriali. Nuove Minoranze, Identità e Cittadinanza in Alto Adige e Catalogna / Migrationspolitik und Territoriale Autonomie. Neue Minderheiten, Identität und Staatsbürgerschaft in Südtirol und Katalonien*.

[38] All Italian and Union citizens, to facilitate the allocation of benefits, must select a linguistic group to which they belong.

[39] Deliberation 1885 of 20 July 2009 by the Autonomous Province of Bolzano.

[40] *Kamberaj* ruling, para. 48 and 49.

[41] *Ibidem*, at 49.

To begin with, it is not coincidental that precisely these four associations intervened in the Kamberaj proceedings. Since 2008 they had been partners in a EU-funded project promoting non-discrimination in the Province of Bolzano.[42] The project consisted partly in providing legal advice to victims of discrimination (but not representing them) and partly in raising awareness about non-discrimination.

The quasi-institutional role played by the four associations made them a reference point for other collective actors in the area. In fact, when the problem of housing benefits for third-country nationals emerged, meetings with other organizations working in the field were organised. The network collectively decided to challenge the province's deliberation in court and to seek a preliminary reference to the Court of Justice. Two pilot cases were identified through contacts with trade unions; the lawyers of these unions eventually conducted the litigation.[43] This gave the four associations the convenient option of intervening in the cases without bearing the costs of the litigation.

As mentioned, two pilot cases were initiated with the aim of challenging the discriminatory distribution of housing benefits: Kamberaj was not the first case brought before the Bolzano Tribunal. The first was N.N.,[44] an action brought a month before Kamberaj by the same trade union's lawyers (Simonato and Pintor) and where the same four associations intervened, but which was decided by a different judge of the Tribunal. Remarkably, although N.N. was similar in many respect to Kamberaj (the facts of the cases were also the same), it led to a different result. In the case of N.N., the judge did not find any inconsistency between Italian and EU law, and accordingly did not refer a question to the Court of Justice. The judge recognised that Mr N.N. was a victim of discrimination, but she merely ordered that he receive individual compensation without challenging the overall legitimacy of the province's policy. This is a remarkable example of how, everything being the same (same case, same argument, same lawyers), the judge is the ultimate master of the preliminary reference proceedings.

Arguably, the associations' role was particularly crucial in the aftermath of the proceedings. In fact, the ruling of the CJEU found that the province's allocation of benefits was discriminatory to the extent that it concerned long-term resident migrants, like Mr Kamberaj. However, treating third-country nationals differently because of their nationality is not prohibited under EU law. Thus, the Bolzano province could have resolved the issue simply by granting equal treatment to long-term residents,[45] but maintaining the less favourable treatment for all other migrants. In this context, the advocacy campaign conducted by the four associations was crucial: they spread information about the CJEU's ruling among their network of associations and via the local press.[46] The associations successfully conveyed the message that the allocation of the housing benefit unlawfully discriminated against migrants, ignoring the fact that this was true only for long-term residents. Their campaign left the province no choice but to change the law and to introduce a more equal way to allocate benefits.

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[42] The project's name was '*Azioni di Tutela dalle Discriminazioni'*, European Social Fund 2/220/2008.

[43] Report of the European Social Fund Project number 2/220/2008, *'Azioni di Tutela dalle Discriminazioni. Rapporto di attività*', page 36.

[44] Order of the Tribunal of Bolzano, *N.N.* case, issued on 16 November 2010, RG 665/2010, available at http://www.humanrightsinternational.org/it/attualita-ricerche/news/italia-tribunale-di-bolzano-ordinanze-no-6652010-e-no-6662010.html.

[45] This is how the Province accommodate the situation of Union citizen migrants, who are treated like members of the linguistic minorities.

[46] The Court of Justice decision was published in the main local press (see '*Sussidio casa, stroncatura dell'UE*', published in '*Alto Adige*' on 14 December 2011), on the Human Rights International's website (http://www.humanrights international.org/it/attualita-ricerche/news/lussemburgo-italiaalto-adige-successo-davanti-la-corte-di-giustizia-europea-contro-le-discriminazio.html, last access on 4 August 2017).

Equal Access to Family Benefit: The Cases of Martinez Silva and Nabil

Martinez Silva, at first glance, does not seem to be a public interest litigation case: neither a third-party intervention nor a collective actor was involved. However, one of the lawyers representing Mrs Martinez Silva, Alberto Guariso, was a member of the ASGI's board (Association for Juridical Studies on Immigration), the most important Italian network of legal experts in the field of migration law.[47] For many years, ASGI has been a leading actor in conducting strategic litigation and advocacy campaigns.[48] A few years ago, the association established an anti-discrimination centre, whose director is, in fact, Alberto Guariso. This lawyer is also the link with the second case analysed in this section, Nabil, where he represented both the victim and the two collective actors: ASGI and the non-profit organization Avvocati Per Niente (APN), which was founded by Guariso. In the next two sub-sections, I will first give an overview of the two proceedings. I will then analyse the role of collective actors in the specific area where the two cases originated: equal access to family benefits.

Martinez Silva: the proceedings

Martinez Silva is an interesting example of (less visible) collective actors' participation. The case has been referred by the Genova Court of Appeal and has been recently decided by the CJEU.[49] This reference gave the Court of Justice the opportunity to interpret the Single Permit Directive for the first time.[50] The questions asked by the Italian court touch upon the equality clause of the Directive: shall third-country workers enjoy equal treatment with Italian nationals with regard to certain benefits?[51] As in Kamberaj, the applicant's basis for claiming equal treatment derives from an EU directive on migration; this time the Race Equality Directive was not even called into question.

Mrs Martinez Silva initiated a civil action against discrimination (article 44 of the Italian Immigration Law) in order to challenge the rejection of her application for benefits. This is a special type of family benefit directed to households below a certain income and with at least three minor children (hereinafter, the child benefit).[52] The rejection was based solely on the fact that Mrs Martinez Silva is a third-country national with a single permit status.[53] Indeed, when introduced in 1998, the child benefit was limited to Italian nationals residing in Italy. However, as the Genova Court of Appeal pointed out, the law has already been amended a number of times to include among the beneficiaries certain categories of non-nationals: first, Union citizens; then, refugees; and, lastly, long-term resident migrants.[54] In light of the foregoing, and recalling the equality treatment clause in the Single Permit Directive, the Court of Appeal asked the Court of Justice whether the Italian legislation excluding single-permit migrants from the recipients of the child benefit is compatible with EU Law. In its judgment, the CJEU first examined

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47 ASGI official website: http://www.asgi.it/

48 About the role of ASGI in other cases of legal mobilization, Virginia Passalacqua, "El Dridi Upside down : A Case of Legal Mobilization for Undocumented Migrants' Rights in Italy," *Tijdschrift Voor Bestuurswetenschappen En Publiekrecht*, 2016, 215–25.

49 Case C-449/16, *Kerly Del Rosario Martinez Silva v Istituto nazionale della previdenza sociale (INPS), Comune di Genova,* 21 June 2017, OJ C 410/08. See also the Order for Reference by the Genova Court of Appeal of 1 August 2016, case n. 437/2015 RG, available at available at http://www.asgi.it/wp-content/uploads/2016/08/s-comune-genova-cda-genova-rg-437-del-2015-ord-rinvio-cge-01-08-2016.pdf.

50 Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (OJ 2011 L 343).

51 Article 12(e).

52 The benefit is known as 'allowance for households with at least three minor children' (*Assegno per i nuclei famigliari con almeno tre figli minori)* and was introduced by article 65 of the Law 448/1998.

53 Order for Reference, at 2.

54 Order for Reference, at 13.

whether the child benefit can be considered as a social security benefit, and answered affirmatively.[55] Then, it stated that a single-permit migrant may not be excluded from receiving a benefit such as the child benefit by national legislation, because of the Directive's equality treatment clause.[56] This judgment represents an important endorsement of the arguments brought forward by Mrs Martinez Silva's lawyers.

Nabil: the proceedings

The Nabil case did not give rise to a preliminary reference to the Court of Justice; nevertheless, it offers important insights into collective actors' participation and into the problems they might face. Indeed, the lack of an organic and coherent transposition of the Race Equality Directive created problems for collective actors' access to court.

In Nabil, the claimants challenged the legality of a public statement issued by the Italian social security agency (INPS) whereby it declared that long-term residents are not eligible to receive the child benefit for the first half of 2013.[57] The statement is clearly at odds with the equality clause of the Long-Term Resident Directive, which states that long-term residents should be treated equally vis-a-vis Italian citizens.[58] Hence, the INPS's statement was challenged in court as amounting to both individual and collective discrimination. The individual discrimination was judicially contested by Mr Mohammed Nabil, a long-term resident with three children. Two associations, ASGI and APN, also challenged the INPS's statement for enacting collective discrimination, as defined by the Italian transposition of the Race Equality Directive.[59] Under that law, discrimination is collective when, due to its general scope, its victims are not directly and immediately identifiable; in this case, collective actors have the right to bring legal action by themselves.

The case of Nabil was recently decided by the Italian Supreme Court.[60] The substance of the case was no longer in doubt: the first-instance court declared the statement discriminatory on the grounds of nationality. However, INPS contested the claimants' locus standi before the Appeal and Supreme Courts. With regard to Mr Nabil, the courts upheld INPS' view: since the statement was not an individual rejection of Mr Nabil's application for the child benefit, he could not complain about concrete discriminatory treatment.

Regarding ASGI and APN, INPS challenged their locus standi, arguing that the prohibition of collective discrimination does not apply in cases of nationality discrimination, like Nabil. Indeed, the Italian law-maker prohibited collective discrimination in the same law that transposed the Race Equality Directive, which addresses only discrimination on the grounds of race/ethnic origin. Accordingly, collective discrimination on the ground of nationality is not covered, since nationality is excluded from the scope of the Directive. INPS claimed that its interpretation was in line with the Italian framework, since nationality discrimination is considered less serious than discrimination on the grounds of race/ethnic origin.[61] Like in Kamberaj, the fact that Italian law regulates separately discrimination on the grounds of nationality and racial/ethnic discrimination gives rise to problems of interpretation. And Nabil is not

[55] Art. 3(1)(j) of Regulation 883/2004 defines and distinguishes between social security and social assistance benefits.

[56] See *Martinez-Silva* Judgment at 31.

[57] See Circolare n. 4 of 15 January 2013, where INPS states that, since the Long-Term Resident Directive was transposed in the Italian legal order on August 2013 (by the Legge Europea 97/2013) before that date the equal treatment clause does not apply.

[58] See the equality clause of the Long-Term Resident Directive 2003/109, at art. 11(1).

[59] Article 5(3) Legislative Decree 215/2003, transposing the Race Equality Directive.

[60] Corte Suprema di Cassazione, Sezione Lavoro, *INPS v. Nabil and ASGI and APN*, n. 11166/17 (May 8, 2017).

[61] Ibid., para. 3.2.

an isolated case: recently the number of cases where collective actors' locus standi was similarly challenged increased.[62]

On 8 May 2017, the Italian Supreme Court issued its judgment in Nabil. The Court upheld the interpretation of the lower courts: it stated that collective actors do have locus standi in cases of collective discrimination on the grounds of nationality. The Supreme Court explained its decision by stating that nationality and race/ethnic discrimination are equally prohibited by Italian law, and therefore they should be equally regulated. The Court interpreted broadly the law transposing the Race Equality Directive, so that the remedy against collective discrimination includes also discrimination based on nationality. According to the Court, a different interpretation would not be in line with Italian law because it would leave acts that are clearly discriminatory, like the INPS's statement, unpunished.[63] The judgment in Nabil represents an important step for collective actors, which now see their right of access to the courts secured, especially in the field of migrants' equality.

Equal access to family benefit and the role of collective actors

Family benefits have been at the centre of many battles for migrants' equality in the last decade: the cases analysed here are just two of many. These proceedings fostered the implementation of the equality clauses provided by the Long-Term Resident and the Single Permit Directives. As the Court of Appeal in Martinez Silva recalled, the Italian law-maker intervened three times to extend the group of persons eligible for the child benefit. What the Court did not say is that, prior to the Italian law-maker's acknowledgement that the law needed to be amended, several cases had (mostly successfully) challenged the discriminatory character of the child benefit law, before both national and European courts.[64]

ASGI, with its anti-discrimination centre, is involved in this battle on three fronts. First, it raises awareness about anti-discrimination law by conducting monitoring activity and advocacy campaigns. Secondly, it supports litigation against discrimination in courts by either bringing cases by its own members or by offering training and advice to other lawyers. Finally, ASGI works with institutions, establishing a dialogue with local governments, social security agencies and proposing legislative amendments.

Although the work of ASGI and similar associations is remarkable, such a decentralised judicial enforcement of the Directives' equality clauses has many drawbacks compared to centralized enforcement by the law-maker. It takes a long time, is costly and depends on the availability and expertise of lawyers or associations working in the anti-discrimination field. Indeed, even big associations like ASGI have a limited reach. Most of its activity is concentrated in Lombardy and the North of Italy; the association is almost absent in some regions of the South. More importantly, even if ASGI lawyers successfully challenge a norm/act in court because it is discriminatory, the judgement is valid only in relation to the case at issue, and does not influence the validity of the discriminatory norm in other cases. In this respect, obtaining a positive ruling by the Court of Justice can be of invaluable help: preliminary rulings are binding erga omnes, and the discriminatory norm would be deprived of its effects.

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[62] Interview with Alberto Guariso, 6 February 2017.

[63] Corte Suprema di Cassazione, Sezione Lavoro, *INPS v. Nabil and ASGI and APN*, n. 11166/17 at 5.

[64] The case of a Tunisian migrant worker's eligibility for the child benefit was brought before the ECtHR: *Dhahbi v. Italy*, European Court of Human Rights, n. 17120/09, 8 April 2014; see also the infringement procedure brought by the EU Commission against Italy regarding long-term resident migrants, Infringement Proceedings 2013_4009. There are many Italian cases challenging the exclusion of migrants from family benefits, for example: *El Housni against INPS*, Tribunale di Genova, Order n. 2656 of the 24 September 2012; Case 351/2010 RGL, *Azem v. INPS*, Tribunale di Gorizia, 1 October 2010.

Conclusion

The implementation of EU equality law in Italy has proceeded along two parallel tracks. At the institutional level, the Italian law-maker transposed the EU anti-discrimination directives in an unsystematic way, at the expense of coherence and legal certainty. It also created an Italian Equality Body, UNAR, but it mainly performs monitoring tasks and is not active in courts. Instead, at the local level, collective actors are working for the effective implementation of anti-discrimination norms through litigation, especially in the field of race/ethnic origin and nationality discrimination. Focusing on such decentralized enforcement of EU equality law, this paper has sought to understand whether the 'proceduralization' of EU equality law helped collective actors' access to courts. However, the answer is not clear-cut, for some ambiguities emerged within the EU equality law and procedures.

In the case of Kamberaj, four associations intervened via an Italian legal procedure. These associations used EU equality law to support their claims, but not EU procedural norms. The same holds true for the second case, Martinez Silva. The collective actor did not use any of the EU law procedures to participate in the case; the lawyer and member of a collective actor (ASGI) was privately hired to represent Mrs Martinez Silva in the case. Finally, the Nabil case illustrates how, under certain conditions, the discrepancy in the scope of EU law and Italian Immigration law might even hinder access to courts for collective actors. Since some norms for collective actors' participation have been introduced in Italian law in relation to the Race Equality Directive, their validity in proceedings regarding nationality discrimination has been challenged, making collective actors' locus standi contested. Eventually, the Nabil case concluded with a positive ruling for collective actors. However, an intervention by the Italian law-maker is desirable, since it could remedy the fragmentation in the anti-discrimination field and provide for a single set of procedures valid for all grounds of discrimination.

This paper showed that, EU norms, such as the equality clauses of the migration directives, provide useful new tools to advance equality in Italy. These norms were often used fruitfully by collective actors, as the cases about litigation for migrants' equal treatment demonstrated. On the other hand, the unsystematic implementation of some EU law provisions created obstacles for collective actors' participation. Namely, the exclusion of nationality discrimination from the scope of the Race Equality Directive was problematic. EU law does not fully protect third-country nationals from illegitimate discrimination on the grounds of nationality, and this generates 'equality gaps', as noted by Muir.[65] To offset these inequalities, collective actors are actively engaged in litigation, advocacy and campaigns at the local and national level to concretely advance equal treatment for third-country nationals. Hopefully, judgments like the one delivered in Nabil by the Italian Supreme Court will open new doors to facilitate their work.

[65] Elise Muir, "Enhancing the Protection of Third-Country Nationals Against Discrimination: Putting EU Anti-Discrimination Law to the Test," *Maastricht Journal of European & Comparative Law*, no. 1–2 (2011): 136–56.